Supreme Court, U.S.
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(2)

No. 00-523

In the Supreme Court of the United States

EMANUEL OBAJULUWA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the district court had jurisdiction under 28 U.S.C. 2241 over petitioner's challenge to his final removal order.

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In the Supreme Court of the United States

No. 00-523

EMANUEL OBAJULUWA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 226 F.3d 641 (Table). The judgment and order of the district court (Pet. App. 6a-7a) are unreported, as are the findings and recommendations of the magistrate judge (Pet. App. 8a-12a), the decisions of the Board of Immigration Appeals (App., *infra*, 1a-4a, 5a-7a) and the decision of the immigration judge (App., *infra*, 8a-11a).

JURISDICTION

The order of the court of appeals was entered on July 7, 2000. The petition for a writ of certiorari was filed on October 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien is subject to removal if he has been convicted of any "aggravated felony," as defined in the INA at 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998). See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had a lawful unrelinquished domicile in this country for seven years, and that, if he had been convicted of an aggravated felony, he had not actually served a term of an imprisonment of five years or more. See 8 U.S.C. 1182(c).

If the Attorney General denied relief from deportation under Section 1182(c), then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See

8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens, including any alien convicted of an aggravated felony, categorically ineligible for discretionary relief from deportation under that Section. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998))). Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." 110 Stat. 1276-1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. IV 1998); 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. An alien convicted of any aggravated felony is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as

amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial review provisions with the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of Nigeria who entered the United States in December 1981 and became a lawful permanent resident on December 27, 1990. On August 18, 1994, he was convicted in federal district court of conspiracy to commit wire fraud, money laundering, and credit card fraud, in violation of 18 U.S.C. 1343, 1956(a)(1), and 1029(a)(2), and credit card fraud, in violation of 18 U.S.C. 1029(a)(2). See App., *infra*, 2a. The district court sentenced petitioner to two concurrent terms of 56 months' imprisonment. Pet. App. 2a.

On April 22, 1997, after the full effective date of IIRIRA, the INS placed petitioner in removal proceedings based on his 1994 convictions, which are aggravated felonies rendering an alien removable under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). Pet. App. 2a.[1] At a hearing before an immigration judge (IJ) on January 9, 1998, petitioner conceded his removability as an aggravated felon. App., *infra*, 9a. On March 6, 1998,

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[1] See 8 U.S.C. 1101(a)(43)(D) (1994 & Supp. IV 1998) (definition of aggravated felony includes money laundering involving more than $10,000); 8 U.S.C. 1101(a)(43)(M)(i) (1994 & Supp. IV 1998) (offense of fraud or deceit involving loss to victim of more than $10,000); 8 U.S.C. 1101(a)(43)(U) (Supp. IV 1998) (attempt or conspiracy to commit any listed offense). Before the enactment of IIRIRA, the INA's definition of aggravated felony required that a money laundering offense involve more than $100,000, and that a fraud or deceit offense involve a loss to the victim of more than $200,000. 8 U.S.C. 1101(a)(43)(D) and (M)(i) (1994); see IIRIRA § 321(a)(2) and (7), 110 Stat. 3009-627 to 3009-628 (amending definition of aggravated felony). Petitioner, however, would have been an aggravated felon even under the pre-IIRIRA definition. The presentence report in petitioner's criminal case, which is in the certified administrative record, indicates that his offenses involved more than $300,000, and the district court ordered petitioner to pay more than $300,000 in restitution.

the IJ ordered petitioner removed to Nigeria. *Id.* at 11a.

The Board of Immigration Appeals (BIA) affirmed. The BIA held that petitioner was ineligible for relief under 8 U.S.C. 1182(c) (1994) because that form of relief had been repealed by IIRIRA and was not available in post-IIRIRA removal proceedings. App., *infra*, 4a. The BIA also ruled (*ibid.*) that, as petitioner had been convicted of aggravated felonies, he was also ineligible for the discretionary relief that replaced Section 1182(c) for aliens in removal proceedings—namely, cancellation of removal under Section 1229b(a)(3).

On November 25, 1998, the BIA denied petitioner's motion to reconsider. App., *infra*, 5a-7a. As in its initial decision, the BIA stated that petitioner was in removal proceedings and thus was not eligible for relief under Section 1182(c), and that he was ineligible for cancellation of removal because of his criminal convictions. *Id.* at 6a-7a. The BIA also rejected petitioner's argument that IIRIRA's repeal of Section 1182(c) should not be applied "retroactively" to his case because he was convicted of his crimes prior to the changes in the law. The BIA further stated that it lacked jurisdiction to consider petitioner's objections to the constitutionality of that repeal as applied to his case. *Id.* at 7a.

3. Petitioner did not file a petition for review of his removal order in the court of appeals. Rather, on February 9, 1999, petitioner filed a petition for a writ of habeas corpus in district court, seeking to invoke that court's jurisdiction under 28 U.S.C. 2241. Petitioner contended that the BIA's decision holding him ineligible for relief under former Section 1182(c) was a "retroactive" application of IIRIRA's repeal of that provision that violated the Due Process and Ex Post Facto

Clauses of the Constitution. Petitioner also contended that the INS unlawfully delayed the commencement of his removal proceedings until after the effective date of IIRIRA. The government moved to dismiss on the ground that AEDPA and IIRIRA had divested the district courts of authority under 28 U.S.C. 2241 to review the merits of aliens' removal orders, and that any judicial review that remained available to criminal aliens such as petitioner must be had, if at all, in the court of appeals on petition for review. Pet. App. 8a-9a. Based on the recommendation of the magistrate judge, the district court agreed and dismissed the petition. *Id.* at 6a-7a, 8a-12a.

4. The court of appeals affirmed the district court's dismissal of the habeas corpus petition. The court relied (Pet. App. 3a-4a) on its recent decision in *Max-George* v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280, which held (*id.* at 198-203) that IIRIRA divested the district courts of authority to review the merits of final deportation orders under 28 U.S.C. 2241. The court also indicated (Pet. App. 4a-5a) that the preclusion of review under Section 2241 in petitioner's case raised no concerns about an unconstitutional suspension of habeas corpus because "[t]he record in this case discloses no basis for finding that [petitioner] raised claims within the constitutional writ [of habeas corpus], which is narrower than under section 2241." In particular, the court stated that it had previously held that "a retroactively applied criminal categorization in the immigration context is not a due process violation," and that "denial of consideration for discretionary relief is not a constitutional violation." *Id.* at 4a-5a. The court also stated that petitioner's "claim

of delay * * * does not fall within the ambit of the constitutionally protected writ." *Id.* at 5a.[2]

DISCUSSION

Petitioner urges this Court to grant review to decide whether, after the comprehensive changes to the Nation's immigration laws made by AEDPA and IIRIRA, the district courts retain authority under 28 U.S.C. 2241 to review an alien's challenge to the merits of his final removal order. Petitioner correctly points out (Pet. 8-9) that the courts of appeals have reached differing conclusions on that question. The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have concluded that Congress divested the district courts of such authority. By contrast, the First, Second, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over retroactivity challenge); *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000) (same), petition for cert. pending, No. 00-767; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000) (same); see

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[2] On October 10, 2000, five days after petitioner filed his petition for a writ of certiorari in this case, petitioner filed in district court an emergency motion to stay his removal pending disposition of the certiorari petition. On October 12, 2000, the district court ruled that it had no jurisdiction to stay the mandate of the Fifth Circuit and denied petitioner's motion. On October 12, 2000, the court of appeals also entered an order denying petitioner's motion for a stay of removal. Petitioner did not seek a stay in this Court. We are informed by the INS that, on October 13, 2000, petitioner was removed to Nigeria.

also *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (same), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[3] In our view, *St. Cyr* is a better vehicle than this case for resolution of that jurisdictional issue. In particular, our petition in *St. Cyr* also seeks review of the court of appeals' decision ruling for the alien on his challenge to the merits of the removal order in that case, which independently warrants plenary review in the event that the Court concludes in that case that jurisdiction was proper

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[3] We are providing petitioner with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented by the petitions in *Zalawadia* v. *Reno*, No. 00-268; *Rodriguez* v. *INS*, No. 00-753; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

under 28 U.S.C. 2241. See 00-767 Pet. at 26-30; *St. Cyr*, 229 F.3d at 410-420.[4] The petition in this case, however, presents only the jurisdictional issue.[5] We therefore suggest that the Court hold the petition in this case pending its disposition of the petition in *St. Cyr*, and then dispose of this petition in light of the disposition of *St. Cyr*.

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[4] We noted in our petition (at 26-30) in *St. Cyr* that the Second Circuit's decision on the merits could not be reconciled with decisions of the Seventh and Eleventh Circuits. Since that petition was filed, the Ninth Circuit has issued a decision that also diverges from the Second Circuit's decision on the merits in *St. Cyr*. In *St. Cyr*, the Second Circuit held that IIRIRA's repeal of Section 1182(c) was not applicable in the case of any alien who pleaded guilty to an aggravated felony before the enactment of AEDPA and IIRIRA. See 229 F.3d at 417-421. In *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956, at *4 (Nov. 17, 2000), the Ninth Circuit concluded that IIRIRA's repeal of Section 1182(c) may be applied to an alien who pleaded guilty before AEDPA and IIRIRA were enacted, except in the "rare circumstance" where the alien shows that he pleaded guilty in specific reliance on the state of the law at the time, permitting him to apply for relief under Section 1182(c).

[5] In adddition, as we have explained at p. 9 n.2, *supra*, petitioner has been removed to Nigeria. Although IIRIRA's new judicial review provisions repeal the provision in prior law that a court may not review a deportation order entered against an alien who has departed from the United States, see 8 U.S.C. 1105a(c) (1994), petitioner's removal in our view is a factor that further suggests this would not be the best vehicle for resolution of the jurisdictional issue.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

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DECEMBER 2000

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A91 879 391 – Dallas Date: Sep 28 1998

In re: EMMANUEL OBAJULUWA
a.k.a. Tobi Obajuluwa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: David Butbul, Esquire
4051 Old Orchard Road
Skokie, Illinois 60076

CHARGE: Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Asylum; withholding of removal; cancellation of removal

The respondent appeals from a decision of an Immigration Judge ordering him removed from the

United States to Nigeria as charged. The appeal is dismissed.[6]

The respondent is a native and citizen of Nigeria and a lawful permanent resident of the United States. The record reflects that on August 18, 1994, the respondent was convicted in the United States District Court for the Southern District of Texas of Conspiracy to Violate 18 U.S.C. §§ 1343, 1956(a)(1), and 1029(a)(2) in violation of 18 U.S.C. § 371, and of Credit Card Fraud, in violation of 18 U.S.C. § 1029(a)(2). The respondent was sentenced to imprisonment for a term of 56 months for each count, sentences to run concurrently. Both of these crimes clearly fall within the definition of an "aggravated felony." *See* sections 101(a)(43)(D), (M)(i), and (U) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(D), (M)(i), and (U).

At a hearing held on January 9, 1998, the respondent conceded removability as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Tr. At 3). The Immigration Judge found that the respondent was statutorily precluded from applying for or being granted asylum because of his aggravated felony convictions (Tr. At 5; I.J. at 4). *See* section 208(b)(2) of the Act.

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[6] The Notice to Appear (Form I-862) in this case was issued after April 1, 1997. Therefore, the law as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), applies to these proceedings.

The respondent, through counsel, indicated on January 9, 1998, that he may wish to apply for withholding of removal, and proceedings were continued until January 30, 1998, for filing of the application (Tr. at 14). On January 30, 1998, the respondent, again through counsel, stated that his application for withholding of removal was not yet ready (Tr. at 26). The Immigration Judge notified the respondent that his application must be filed by February 5, 1998 (Tr. at 26). On February 6, 1998, the respondent's counsel submitted a motion to withdraw as attorney of record. The Immigration Judge subsequently extended the filing deadline to February 27, 1998, and again to March 6, 1998, but the respondent failed to submit an application for relief on those dates (Tr. at 28). On March 6, 1998, the Immigration Judge found that the respondent had abandoned his application for withholding of removal, that he was ineligible for any other form of relief, and ordered him removed to Nigeria as charged (Tr. at 29, 31; I.J. at 2-4).

On appeal, the respondent argues that the Immigration Judge erred in not allowing him additional time to file his application for withholding and in not considering the harm the respondent may face upon return to Nigeria. In support of his appeal, the respondent has submitted an application for asylum and withholding (Form I-589), in addition to a newspaper article about Nigeria. However, we find that the respondent was provided ample opportunity to complete his application for withholding of removal and we agree with the Immigration Judge that he abandoned this application. The regulations provide that if an application is not filed within the time set by the Immigration Judge, the opportunity shall be deemed waived. 8 C.F.R. § 3.31(c).

Furthermore, this Board had long held that applications for relief under the Act are properly denied as abandoned or for lack of prosecution when the alien fails to file for or pursue them. *Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987), and the cases cited therein; *Matter of Jean*, 17 I&N Dec. 100 (BIA 1979), *modified on other grounds, Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992).

On appeal, the respondent also argues that he is eligible for relief under section 212(c) of the Act. However, this relief is not available to the respondent in removal proceedings, having been repealed and replaced by section 240A of the Act. The respondent is not eligible for cancellation of removal under section 240A of the Act because he has been convicted of aggravated felonies. *See* section 240A(a)(3) of the Act. Although the respondent raises objections to the constitutionality of the law as it applies in this case, it is well settled that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). We must apply the law as written. *See Matter of Gonzalez-Camarillo*, Interim Decision 3320 (BIA 1997), and cases cited therein; *Matter of Yeung*, Interim Decision 3297 (BIA 1996).

As the respondent has not demonstrated eligibility for any relief, the appeal is dismissed and the decision of the Immigration Judge is affirmed.

ORDER: The appeal is dismissed.

Signature illegible
FOR THE BOARD

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A91 879 391 – Dallas Date: Nov 25 1998

In re: EMMANUEL OBAJULUWA
a.k.a. Tobi Obajuluwa

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

CHARGE: Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Reconsideration

ORDER:

PER CURIAM. The case was last before us on September 28, 1998, when we dismissed the respondent's appeal from an Immigration Judge's decision finding him removable as charged, determining that he

had abandoned his application for withholding of removal, and finding him statutorily ineligible for any other form of relief from removal due to his aggravated felony convictions. The respondent has filed a timely motion to reconsider our September 28, 1998, decision. The respondent's motion is denied.

A motion to reconsider requests that the original decision be reexamined because improper legal standards were applied, there have been recent changes of law, or there was an argument or aspect of the case that was overlooked or misconstrued. *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd* 979 F.2d 212 (11th Cir. 1992); 8 C.F.R. § 3.2 (b) (1998).

In support of his motion, the respondent argues that we erred in finding him ineligible for relief under section 212(c) of the Immigration and Nationality Act. However, as we noted in our prior decision, this relief is not available to the respondent in removal proceedings, having been repealed and replaced by section 240A of the Act. Moreover, the respondent is statutorily ineligible for cancellation of removal under section 240A because he has been convicted of aggravated felonies. *See* section 240A(a)(3) of the Act. With respect to the respondent's argument that he was convicted of his crimes before the recent changes in immigration law and therefore the laws should not be applied retroactively, we note that the changes in the definition of an aggravated felony apply to all convictions "regardless of whether they were entered before, on, or after the date of enactment." Section 321(b) of IIRIRA. This definition applies to "all actions taken on or after the enactment of (IIRIRA), regardless of when the conviction occurred." Section 321(c) of IIRIRA.

Although the respondent once again raises numerous objections to the constitutionality of the law as it applies in his case, we reiterate that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *Matter of C-*, 20 I&N Dec. t529 (BIA 1992). We must apply the law as written. *See Matter of Gonzalez-Camarillo*, Interim Decision 3320 (BIA 1997), and cases cited therein; *Matter of Yeung*, Interim Decision 3297 (BIA 1996).

The authorities cited by the respondent in support of his motion are either inapposite or are not binding on this Board outside the jurisdiction in which they arose. We therefore find no reason to disturb our prior decision in this case. Accordingly, the motion to reconsider is denied.

Signature illegible
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Dallas, Texas

File No.: A 91 879 391 March 6, 1998

In the Matter of	)	
	)	
EMMANUEL OBAJULUWA	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 327(a)(2)(A)(iii); conviction of an aggravated felony

APPLICATION: Asylum and withholding of deportation.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Pro Se	John Allums, Esquire General Attorney Dallas, TX

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 36 year-old married (but separated) male alien, a native and citizen of Nigeria, who entered the United States as a visitor in 1981 at

Detroit, Michigan. He stayed many years beyond his authorized period of stay and was later adjusted to the status of a permanent resident in December of 1990. He was placed in removal proceedings pursuant to a Notice to Appear dated April 22, 1997 charging him with removal under the above-referenced section of the Act and specifically on the basis of an allegation of an August 1994 conviction in federal court for conspiracy and credit card fraud.

The respondent, initially represented by counsel in bond proceedings and at the initial master calendar, admitted the enumerated allegations contained in the charging document and conceded his removability. Nigeria has been designated by the Court as the country for removal.

The original counsel for respondent, after consultation with the respondent, indicated that he could not, in good faith, proceed with a request for any relief relating to asylum or withholding. Accordingly, the respondent's counsel asked for and with the concurrence of the respondent received a permission to withdraw from this case and an order was executed. The respondent then proceeded and was provided additional time to both look for an attorney and to file the application for relief. It should be noted that this case originally began out at the Big Spring Correctional Facility and the respondent has been in these proceedings since at least May of 1997. He has had numerous opportunities to file the I-589 relative to his purported request for withholding of deportation. He has had at least three separate dates by which those applications in bare and minimal form were due before the Court. He last appeared one week ago today at which time he again

failed to have the application and, despite these many opportunities and continuances, the respondent appeared again today despite this Court's warnings without an application.

The respondent presented himself today again without the application and asked for additional time to both obtain an attorney and to submit the application. He purported to have retained an attorney by the name of David Butbul, who is an attorney known to this Court in Chicago, Illinois. This Court endeavored to contact Mr. Butbul, however, he was not available. Speaking with his administrative assistant, she reported that no outstanding file existed which would reflect the representation by Mr. Butbul of this respondent.

This Court views the respondent's 10 months in proceedings and various times with the assistance of counsel and with full knowledge of the issues facing him and the very limited opportunity for relief, as having utterly no excuse for a failure in a 10-month period of time to submit an I-589. Accordingly, the Court believes, as I ruled in an earlier bond motion, that this respondent is an individual engaged in nothing but dilatory tactics who will continue to seek every possible unmerited delay in order to prevent his return to Nigeria. This Court again encourages anyone reviewing this matter at any stage and any time to ensure that nothing is done to remove the fact that this respondent remains solely in the custody without bond of the Immigration Service during the pendency of this and any other proceedings.

That said, the Court finds that the respondent has knowingly and willfully abandoned any purported application for relief. He is statutorily ineligible as an aggravated felon for asylum and he has stated absolutely no basis under which he can seek withholding of deportation. At some point in time there is such a thing a personal accountability and this respondent has been babied through this process and offered every opportunity to articulate a meaningful form of relief. His failure to do so is inexcusable and he has fully merited his order of removal to the nation of Nigeria.

There is no other relief available for this convicted aggravated felon.

Accordingly, on the basis of the totality of the evidence and the circumstances of this case, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States as an aggravated felon to the nation of Nigeria.

D. ANTHONY ROGERS
D. ANTHONY ROGERS,
Immigration Judge